Kampat Timber Industries Sdn Bhd v Bensa Sdn Bhd

HIGH COURT (JOHORE BAHRU) — COMPANIES WINDING UP NO 42-43 OF 1988
ABU MANSOR J
27 APRIL 1989

Companies and Corporations — Winding up — Whether solicitors authorized to sign statutory notice — Whether sum in statutory notice ascertained — Meaning of claim for interests and costs in the statutory notice — Whether claim for interests and costs was additional to the sum demanded and vitiated the statutory notice — Moneys received prior to and after statutory notice — Whether there was waiver of the statutory notice — Discretion of court to waive irregularities — Just and equitable to wind up company — Companies Act 1965, ss 218 & 221

The petitioner applied for the winding up of the respondent alleging that it was unable to pay its debts. The petitioner alleged that the respondent was indebted to them in the sum of $8,099 being the balance of goods sold and delivered. On 24 February 1988, the petitioner's solicitors served the statutory notice under s 218 of the Companies Act 1965, alleging that no payment has been received. The petitioner submitted that the notice served was valid and regular as the sum demanded was ascertainable. The respondent had tendered a sum of $5,399.34 and $100 costs which fell short of the demand, and were paid only after three of the respondent's cheques were dishonoured. Supporting creditors amounted to $2.3m. The respondent opposed the petition on four grounds: (1) that there was no evidence that the petitioner's solicitors had been duly authorized by the petitioner to sign the statutory notice; (2) that the statutory notice was invalid on account that it was for an uncertain sum because of the inclusion of the demand for interest and costs; (3) that by reason of the demand for interest and costs the statutory notice was also invalid because it was in excess of the actual amount due; (4) that a sum of $100 and further sum in place of the dishonoured cheques were received before the presentation of the petition, and that constitutes a waiver of the notice of demand.

Held, allowing the petitioner's application:

(1) The first point raised by the respondent with regard to the authority of the petitioner's solicitors to sign the statutory notice had no merit. The notice was copied to the petitioner showing that the notice was sent with instructions. When the petition was duly filed, it was signed by the sales executive of the petitioner's company. Thus, there was sufficient evidence that the issue of the statutory notice was authorized.

(2) The contention that the statutory notice was invalid as it was for an uncertain sum because of the inclusion of the demand for interest and costs lacked substance. What the petitioner wished to say in the statutory notice was that in the event the demand was not met in due time, the respondent would certainly be incurring costs and interest. It would be perfectly logical that the petitioner would be claiming interest and costs in the event the sum demanded remained unpaid.

(3) Costs and interest were not additional to the sum demanded so as to be in excess of the actual amount due. The warning of the possible payment of costs and interest was proper and correct in the absence of settlement, for if the matters were to proceed, surely the respondent would have to pay costs and interest as according to the nature of things.

(4) The respondent alleged that by the tender of $100 before the presentation of the petition, and a further sum in substitution of the dishonoured cheques on 21 May 1988, there was a waiver of the statutory notice. The payment made on 21 May 1988 was long after the 21-day statutory period had lapsed. The petitioner has the final say whether or not to waive the notice, and no evidence can be found of a waiver. As to the irregularity of not acknowledging the $100 accepted before the notice was issued, the court has wide discretion under s 221(2)(b) of the Companies Act 1965 to waive irregularities and the court did so.

(5) The sole issue was whether the respondent was unable to pay its debts. From the facts, there was overwhelming evidence that the respondent was unable to pay its debts, and the court was entitled to take into consideration contingent and prospective liabilities. Further, it was just and equitable that the respondent be wound up.

Cases referred to

1 *Teck Yow Brothers Hand-Bag Trading Co* v *Maharani Supermarket Sdn Bhd* [1989] 1 MLJ 101 (refd)
2 *National Mutual Life Association of A/Asia Ltd* v *Oasis Developments Pty Ltd & Ors* (1982) 7 ACLR 758 (refd)
3 *Re Globe New Patent Iron & Steel Co* (1875) 20 Eq 337 (refd)
4 *Deputy Commissioner of Taxation* v *Cye International Pty Ltd* (1986) 10 ACLR 305 (refd)

Legislation referred to

Companies Act 1965 ss 218, 221(2)(b)

Ong Ban Chai for the petitioner.
Harcharan Singh for the respondent.

Cur Adv Vult

Abu Mansor J: By their petition dated 3 April 1988, the petitioner applied for the winding up of the respondent on the ground of its alleged inability to pay its debts. The respondent opposed the said petition. After hearing arguments, I reserved judgment. I now give my judgment.

The facts of the case are as follows. The respondent is a company incorporated on 11 December 1982 with its registered office at No 142-M, Jalan Loke Yew, Kuala Lumpur. The authorized capital of the company is $5m divided into five million shares of $1 each. The respondent's objects, amongst others, are to carry on the trade or business of builders and contractors, etc.

The petitioner alleged that the respondent is indebted to the petitioner in the sum of $8,099 being the balance of goods sold and delivered, full particulars of which had been given to the respondent. On 24 February 1988, the petitioner's solicitors served the statutory notice under s 218 of the Companies Act 1965 to the respondent to pay the amount but the petitioner alleges no payment has been received within the statutory period. Hence the petitioner filed this petition as the respondent is unable to pay its debts.

At the date of the hearing of this petition, the petitioner submitted that the notice served by them on the respondent is valid and regular as the sum demanded is ascertainable. In fact the petitioner says (encl (32) para 4) the respondent, by their letter dated 4 March 1988, ten-

dered a sum of $5,399.34 and $100 costs which fell far short of the sum demanded which the respondent agreed to pay. In para 6 of encl (32), the petitioner says the sum of $5,399.34 and $100 were in fact only paid after three of the respondent's cheques were tendered and dishonoured on presentation. It was only after the cheques were dishonoured that the petitioner filed the petition. The petitioner's counsel submitted the list of supporting creditors amounting to $2.3m (encl (48)). The petitioner's counsel submitted that in the present circumstances, there is a presumption of the company's inability to pay its debt. The company is therefore insolvent.

The petitioner's counsel cited *Teck Yow Brothers Hand-Bag Trading Co* v *Maharani Supermarket Sdn Bhd.*[1] He also cited *National Mutual Life Association of A/Asia Ltd* v *Oasis Developments Pty Ltd & Ors*[2] which says if the court determines that a company is insolvent, it is immaterial whether or not the debt is disputed. He also cited *Re Globe New Patent Iron & Steel Co*[3] which states that the dishonour of bills is ample proof that the company is unable to pay its debts. He applied for a winding up.

The respondent opposed the winding up on three grounds. First, he said there was no evidence that the plaintiff's solicitors had been duly authorized by the plaintiff to sign the statutory notice under s 218 of the Companies Act 1965. He cited *McPherson on Winding Up* at p 47 which says that the procedure must be strictly construed. A demand must be in writing signed by an authorized agent. Evidence, he submitted, is therefore required of the authority given to the solicitor to sign the statutory notice. He asked whether the solicitor of the petitioner had authority to sign annexure 2 exh A. I find this first point raised by the respondent to have no merit. I find the evidence is all there for us to see. In the first place the statutory notice is copied to the petitioner's client clearly showing the notice was sent with client's instruction. When the petition was duly filed, it was signed by the sales executive of the petitioner's company. I find there is sufficient evidence that the issue of the statutory notice was authorized.

I also find that the respondent's contention that the statutory notice was invalid on account of the fact that it was for an uncertain sum because of the inclusion of the demand for interest and costs to lack substance. He alleged there is no agreement between the parties to pay interest and since no proceeding was then current, no question of costs arises. With respect, I am of the view it is a misreading of the notice as a whole. What the petitioner wished to say was in the event that the demand was not met in due time, the respondent would certainly be incurring costs and interest. I cannot find any defect in that statement. It is perfectly logical that the petitioner would be claiming for the items of interest and costs in the event the sum demanded remains unpaid. I cannot quarrel with the truth of that statement.

The respondent further alleged that because of these interest and costs, the statutory notice is also not valid because it was in excess of the actual amount due. He cited *Deputy Commissioner of Taxation* v *Cye International Pty Ltd*[4] where it was held that the demand made in the tax notice was an additional sum over and above the amount due and that vitiates the demand for the payment of tax. I find this case is irrelevant as I find that the costs and interest were not additional. The warning of the possible payment of costs and interest was proper and correct in the absence of settlement for if the matters were to proceed, surely the respondent would have to pay costs and interest according to the nature of things.

Then I deal with the respondent's fourth ground that by the petitioner having received a payment of $100 on 10 March 1988 before the presentation of the petition (1 April 1988), it constituted a waiver of the notice of demand. Furthermore, the petition stating in the notice 'no payment had been received' was therefore inaccurate. Then apart from that, the petitioner had also received from the respondent sums on 21 May 1988 in substitution of the dishonoured cheques in para 4(c)(ii) and (iii) of encl (37). The petitioner had kept the money till the date of hearing. No attempt was made by the petitioner to have the money returned. This, according to the respondent, constituted a waiver of the statutory notice.

As for the respondent's allegation of a waiver, I cannot find any evidence of a waiver. The payment of the money was only made on 21 May 1988 when the statutory notice was dated 12 February 1988, the 21-day statutory period having long lapsed. The petitioner has the final say whether or not to waive the notice in view of the evidence from the supporting creditors already in their hands. As for the irregularity of not acknowledging the $100 accepted before the notice was issued, I agreed with the petitioner's counsel that the court has wide discretion under s 221(2)(b) of the Companies Act 1965 to waive irregularities. I do so now.

The respondent, for reasons he assigned, asked for the dismissal of the petition for winding up. I considered whether I should exercise my discretion to make an order for a winding up. As has been established and well settled, the sole issue before the court is whether the respondent is unable to pay its debt and therefore should be wound up. I am of the view on the facts before me, the evidence is overwhelming that the respondent is unable to pay its debts. In so determining, I am entitled to take into consideration contingent and prospective liabilities. The respondent has to pay $2.3m consisting of supporting creditors. The objection taken before me is not that the respondent has the capacity to pay its debts. They were on other issues not central to the issue before me. I also find it is just

and equitable that the respondent be wound up and I do make that order accordingly with costs to the petitioner and other supporting creditors to be taxed.

Application allowed.

Solicitors: *Ong Ban Chai & Co; Chong & Harcharan.*

Reported by *Yap Shao Sin*

Daniel s/o D William v Luhat Wan & Ors

Luhat Wan v Social and Welfare Services Lotteries Board & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NOS P1433 OF 1985 AND A24 OF 1985
LIM BENG CHOON J
12 APRIL 1989

Tort — Detinue, conversion and trespass to goods — Right to property of social welfare lottery ticket — Right to immediate possession of ticket — Right of finder — Plaintiff given possession of ticket by person who had misappropriated it — Proof of purchase of ticket by first defendant — Fraud committed by driver of first defendant — Whether lottery ticket a chattel

Contract — Illegality — Unauthorized person selling lottery ticket — Contract fully executed — Effect of illegality

In this case, the plaintiff in the first action claimed that he had found a lottery ticket crumpled up at an Esso station. Later he found that the ticket had won the third prize in the Tenth Social and Welfare Services Lottery draw. The first defendant, however, claimed that he had a right to the property and possession of the social welfare lottery ticket which had won the third prize. The first defendant claimed that he had bought the lottery ticket and given it with other lottery tickets to his wife for safe keeping. While the first defendant was away in Sarawak, their driver asked the wife for the bundle of tickets in order that he may check them. Subsequently the driver returned the bundles but without the winning ticket. The first defendant made a report and called as witnesses the person from whom he bought the tickets and his wife. The learned trial judge accepted the evidence of the first defendant and his witnesses and rejected that of the plaintiff.

Held, dismissing the plaintiff's claim:

(1) The evidence showed that the first defendant bought the social welfare ticket and that his driver obtained it by fraud. The plaintiff's claim that he found the ticket was rejected and the court found that he had obtained the ticket from some person.

(2) In the circumstances the plaintiff could not be said to have acquired any right of property in the lottery ticket; neither could it be said that he had a better right to immediate possession of the ticket. His right, if any, must come from the possessory right vested in the driver who committed the fraud which in law is subservient to that of the first defendant, his master.

(3) The plaintiff had dealt with the lottery ticket in question in a manner inconsistent with the right of the first defendant and therefore has committed conversion of the ticket. The lottery ticket in this case is a chattel and action lies for its conversion.

(4) Although the seller of the lottery ticket to the first defendant was unauthorized and had therefore committed an offence in selling it without authority, in this case the illegal contract had been fully executed and therefore the title to the lottery ticket passed to the first defendant.

(5) There is no doubt at all that the plaintiff had neither the title nor the right of possession to the winning ticket. In such a situation judgment must be given for the first defendant since the court does not confiscate the property because of illegality.

[*Editoiral Note*: The plaintiff (Daniel s/o D William) has appealed to the Supreme Court vide Civil Appeal No 02-178 of 1989.]

Cases referred to

1 *Clayton* v *Le Roy* [1911] 2 KB 1031 (refd)
2 *Armory* v *Delamirie* [1558-1774] All ER Rep 121 (refd)
3 *Hannah* v *Peel* [1945] KB 509 (refd)
4 *Parker* v *British Airways Board* [1982] 1 All ER 834 (refd)
5 *Fowler & Ors* v *Hollins & Ors* (1872) LR 7 QB 616 (refd)
6 *Marfani & Co Ltd* v *Midland Bank* [1968] 1 WLR 956 (refd)
7 *Farquharson Bros Co* v *C King & Co* [1902] AC 325 (refd)
8 *Jerome* v *Bentley* [1952] 2 All ER 114 (refd)
9 *Johnson* v *Credit Lyonnais Co* (1877) 3 CPD 32 (refd)
10 *Bute (Marquess)* v *Barclays Bank Ltd* [1955] 1 QB 202 (refd)
11 *Central Newbury Car Auctions Ltd* v *Unity Finance Ltd & Anor* [1957] 1 QB 371 (refd)
12 *USA and Republic of France* v *Dollfus Meig et Cie SA and Bank of England* [1952] AC 582 (refd)
13 *Corporation of London & Ors* v *Appleyard & Anor* [1963] 2 All ER 834 (refd)
14 *Sardara Ali* v *Sajan Singh* [1957] MLJ 165 (folld)
15 *Sajan Singh* v *Sardara Ali* [1960] AC 167; [1960] MLJ 52 (folld)
16 *Belvoir Finance Co Ltd* v *Stapleton* [1971] 1 QB 210 (folld)
17 *Eastern & Oriental Hotel (1951) Sdn Bhd* v *Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 (distd)
18 *PP* v *Yeap Kok Ooi* (Alor Star High Court Criminal Trial No 18 of 1984) (unreported) (folld)
19 *Mohamed Ali* v *PP* [1962] MLJ 230 (refd)
20 *Munusamy* v *PP* [1987] 1 MLJ 492 (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Social and Welfare Services Lotteries Board Act 1950 s 9

Karpal Singh for the plaintiff.
Zainur Zakaria for the first defendant.

Cur Adv Vult

Lim Beng Choon J: This civil suit instituted by Daniel a/l D William registered by this court as Civil Suit No P 1433 of 1985 as well as an earlier suit instituted by Luhat Wan registered as Civil Suit No A24 of 1985 (now given a new registration reference No 22-132 of 1987) concerned the right of possession of the social welfare lottery bearing No 1471576 which won the third prize in the Tenth Social and Welfare Services Lottery draw in the year 1985 held on 11 July 1985 at Taiping, Perak.